

SWBT's LSC simple failure to provide FOCs on a timely basis. In short, the "most probative" evidence available shows that SWBT is currently not capable of processing CLEC xDSL-capable loop orders in a nondiscriminatory manner at commercial volumes.

The Telcordia Report does little to rebut that evidence. In fact, Telcordia undertook little, if any, examination of SWBT's xDSL-capable loop provisioning processes.

The Telcordia Report only assessed SWBT's performance on the successful provision of two ADSL Loops. Telcordia's DSL test only encompassed a study *nine* orders for ADSL loops.¹¹⁹ Of these nine loops, only two were "successfully provisioned."¹²⁰

Based on the "limited data" of seeing how two loops were delivered and determining how many pictures could be downloaded from the Web simultaneously with a functional ADSL line,¹²¹ Telcordia effusively concluded "that there are processes and business rules in place by SWBT for ADSL."¹²² Of course, Telcordia's finding has little content, as it provided no analysis as to the sufficiency of those "processes and business rules" are capable of supporting commercial volumes.

¹¹⁹ Telcordia Report at 4.4.1.2 ("A total of nine LSRs were generated.").

¹²⁰ Telcordia Report at 4.4.1.5.3. The seven cancellations were for a variety of reasons.

¹²¹ Telcordia Report at 4.4.1.6 ("The 'Friendly' [test subject] said he tried to download 10 photographs simultaneously as a test"). Unfortunately, readers of the Telcordia Report are not treated to a description of the subject matter of these pictures.

¹²² Telcordia Report at 4.4.1.7.

The Telcordia Test did not adequately analyze “SDSL” loops. Telcordia only analyzed provision of “BRI ISDN loops” for its SDSL testing.¹²³ By its own terms, the Telcordia test plan for DSL did not review pre-ordering, ordering and provisioning processes of loops utilized by CLECs to support SDSL services.¹²⁴ Telcordia admitted that it “did not monitor any of the pre-ordering activities conducted for SDSL.”¹²⁵ Indeed, in the end, no loops that supported SDSL were ever provided by SWBT as part of the test.

As shown above, and as the Texas Commission found in the Covad/Rhythms Arbitration, SWBT has established its systems and policies to favor ADSL deployment at the expense of other flavors of DSL.¹²⁶ In the end, Telcordia simply did not analyze the “submit, reject, and supplement” process that data CLECs like Covad must endure in order to place an order for a loop for an SDSL line, described in the Michael Smith Declaration.

The Telcordia test did not analyze CLEC access to actual loop makeup information. The Telcordia test plan for ADSL only tested CLECs access to the “red-yellow-green” pre-qualification information. As discussed above, both the FCC and the Texas Commission have ruled that this mediated access is not sufficient. The Texas

¹²³ Telcordia Report at 4.4.2.3.1. As discussed in the Michael Smith Declaration, Covad’s orders for SDSL loops face repeated rejections for spectrum management and binder group segregation reasons—rejections that Covad’s orders for BRI ISDN loops do not experience.

¹²⁴ Telcordia Report at 4.4.2.2 (observing that with regard to SDSL loops, “no ordering guidelines exist”).

¹²⁵ Telcordia Report at 4.4.2.4.1.

¹²⁶ SWBT states that Telcordia “verified” SWBT’s “processes and business rules for ADSL”, implicitly conceding that SWBT did not make the same verification for SWBT’s processes for providing CLECs loops for SDSL and other types of DSL. SWBT Brief at 40.

Commission also found in the Covad/Rhythms Arbitration that SWBT retail personnel had superior access than CLECs did to this information, and ordered SWBT to make available real-time access to actual loop makeup information. In short, Telcordia simply did not test whether CLECs had nondiscriminatory and functional access to information such as actual loop length, presence of load coils and repeaters, etc.

The Telcordia test did not analyze SWBT's maintenance, repair, or billing of xDSL-capable loops. The Commission has consistently stated that reliable and nondiscriminatory maintenance, repair and billing OSS are important to the development of local competition. For unbundled loops used to provide ADSL, Telcordia simply did not investigate these aspects of SWBT's OSS.¹²⁷ For unbundled loops used to provide SDSL, Telcordia was unable to test maintenance, repair and billing systems because none of the orders placed that were subject to the test were actually provisioned by SWBT.¹²⁸ At least with regard to SDSL, the third-party test was not "military style"—when no SDSL loops were received, the test simply dropped the issue and moved on.

The CLEC Test Partner Utilized by Telcordia Strongly Disputed Telcordia's Findings. In the end, based upon its review of a handful of orders, Telcordia concluded that the "participating CLEC has been able to acquire loops it is using for SDSL by ordering ISDN loops."¹²⁹ That CLEC—NorthPoint—vigorously disputed that claim

¹²⁷ See Telcordia Report, 4.4.1.3.4 (referring to "maintenance and repair" systems as "Out of Scope"); 4.4.1.3.5 ("billing" systems designated "N/A");

¹²⁸ Telcordia Report at 4.4.2.1 ("Billing and M&R were within the scope for SDSL testing, however, the planned LSRs were not provisioned. Subsequently, these functions could not be performed.").

¹²⁹ Telcordia Report at 2.2.

before the Texas Commission after Telcordia released its report.¹³⁰ NorthPoint stated that Telcordia's SDSL discussion is "misleading" and that the process of using ISDN loops for SDSL "simply did not work . . ."¹³¹

Telcordia refused to observe Covad's collection of data. After release of the Telcordia Report, the Texas Commission requested that Covad provide data on SWBT's provision of xDSL-capable loops. At that time, Covad had already submitted dozens of loop orders in Texas—far more than Telcordia reviewed in its study. Covad invited Telcordia to observe Covad's collection of data in response to the Texas Commission's request, but Telcordia refused.¹³²

* * *

In the end, Telcordia simply did not test the xDSL-capable loop processes that are hampering the deployment of advanced services in Texas today. Telcordia's findings—based on a grand total of four provisioned unbundled loops,¹³³ provide the Commission absolutely no basis for concluding that SWBT's methods and procedures for xDSL-capable loops are adequate.

4. *SWBT Stonewalled Covad Suggestions to Improve the Process*

From even before Covad launched its services in Texas, Covad made suggestions to SWBT to remedy SWBT's Byzantine xDSL-capable loop ordering and provisioning

¹³⁰ Comments of NorthPoint Communications, Inc. on Telcordia's Report Regarding Southwestern Bell Telephone Company's OSS Readiness, Project No. 20000 (Tex. P.U.C.), filed Oct. 13, 1999.

¹³¹ *Id.* at 7.

¹³² Michael Smith Decl. ¶ 24.

¹³³ Telcordia Report at 4.4.1.5.3 (ADSL: "two [loops] were provisioned successfully"); 4.4.2.4.3 (SDSL: "Of the 7 orders placed that required provisioning, 2 were actually provisioned.").

processes. These suggestions generally fell upon deaf ears. In the end, SWBT only seems to agree to reforms because of the “271 hook.”

For example, in Summer 1999, Covad first requested that SWBT perform “acceptance testing” of Covad loop orders. In early 1998, Covad and SBC’s California subsidiary, Pacific Bell, implemented “acceptance testing.” Acceptance testing is a procedure in which the ILEC field technician, after installing the requested loop, contacts Covad by telephone in order to initiate a series of tests. The tests require the ILEC field technician to provide a solid short across the tip and ring of the circuit, and then “open circuit” (*i.e.*, short) the loop. With these tests, Covad can test continuity of the loop back to its equipment in the central office.¹³⁴

SWBT resisted providing Covad acceptance testing in Texas—despite the fact that SWBT’s sister company in California was undertaking this process—for several months. Only on *December 16, 1999*—on the date the Texas Commission’s concluded in its Section 271 Investigation and less than a month before this Application was filed—did SWBT agree to provide the form of “cooperative acceptance testing” described by SWBT for all of Covad’s loops. At the time SWBT filed this Application, actual implementation of acceptance testing was in its infancy—in the first instance, SWBT insisted on adopting amendments to interconnection agreements before it would provide acceptance testing for all of Covad’s loops.¹³⁵ Far from being a virtuous “option” that SWBT “makes available” to data CLECs, obtaining acceptance testing from SWBT in Texas has been like pulling teeth.

¹³⁴ See Goodpastor Decl. ¶¶ 25-29.

¹³⁵ Goodpastor ¶ 27. As a result, Covad will not have the legal right to acceptance testing from SWBT in Texas until February 7, 1999.

The Michael Smith Declaration describes how in October, 1999, Covad suggested to SWBT that it revise the xDSL-loop ordering process that subjects Covad orders to repeated delays because of the need to “supplement” loop orders that do not correspond to SWBT’s retail ADSL service.¹³⁶ Michael Smith even discusses how, at the instigation of the Texas Commission, Covad and SWBT sat down together in November 1999 and agreed to a set of “Reconciled” loop ordering data for certain periods of October 1999 that Covad filed with the Texas Commission.¹³⁷ Covad hoped that this process would have led to recognition by SWBT that its xDSL-loop ordering processes were subjecting Covad orders to interminable delays in FOC receipt and promised installation date. But no changes to SWBT’s xDSL-capable loop ordering process resulted from this effort.

5. Conclusion

In the *Bell Atlantic New York Order*, the Commission stated that if an applicant chose to make its case regarding xDSL-capable loops by submitting performance data, it must show “by a preponderance of the evidence that it provides xDSL-capable loops to competitors in a nondiscriminatory manner.”¹³⁸ The clear deficiencies in SWBT’s xDSL-related performance measurements described above, combined with Covad’s own data, reveals that SWBT’s case falls far short of that evidentiary standard.

The Commission has stated that it would “examine carefully” the performance standards and metrics submitted by a BOC to make this showing. As discussed above, no such examination of SWBT’s data is possible, given the gaping holes in SWBT’s data collection efforts. In particular, SWBT’s systems exclude the lion’s share of Covad’s

¹³⁶ Michael Smith Decl. ¶ 21-22, Exhibit MS-10.

¹³⁷ *Id.* at ¶¶ 23-33.

DSL loop orders from examination. These exclusions make SWBT's performance measurement regime for xDSL-capable loops unrepresentative of reality—far from the “unambiguous performance standards and measures” that the Commission articulated in the *Bell Atlantic New York Order*. The Telcordia Report's “findings” on DSL issues were based on observations of the “processes” for a grand total of four loops in July 1999. And SWBT has resisted implementing Covad's suggestions to improve its processes.

In the end, SWBT's claims in its Application that it is either providing xDSL-capable loops with “generally comparable installation timelines” to retail, that it provides xDSL-capable loops “that are equal in quality” to retail, and that it does not have sufficient data for “provisioning and maintenance data” to draw any general conclusion are unsupported—and unsupportable.

Potential solutions abound, but they have not been fully implemented yet. SWBT has yet to fully implement acceptance testing for Covad loop installations. SWBT is legally obligated to make real-time, electronic access to loop makeup information by May 30, 2000. In addition, the Texas Commission is scheduled to reassess the business rules and performance metrics in April 2000.

But those steps have not been taken yet. Today, SWBT simply cannot rely upon its actual provisioning of loops to support advanced services to support its application. As a result, SWBT has simply failed to prove compliance with Checklist Item (iv) with regard to DSL-capable loops under this avenue described by the Commission in the *Bell Atlantic New York Order*.

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Bell Atlantic New York Order at ¶ 333.

C. SWBT has not Satisfied the “Structural Separation” Avenue of Proving Compliance

In the *Bell Atlantic New York Order*, the Commission provided BOCs an alternative means of proving compliance with Checklist Item (iv) with regard to xDSL-capable loops. The Commission stated that if a BOC provided “proof of a *fully operational* advanced service affiliate,” that showing would amount to a presumption of compliance, which could be rebutted by competitors through a specific factual showing.¹³⁹ In the Commission’s opinion, a “fully operational” advanced services affiliate “would use the same processes as competitors” and would therefore “ensure a level playing field between the BOC and its advanced services competitors.”¹⁴⁰

1. SBC’s Separate Affiliate is not “Fully Operational”

SWBT admits in its application that its separate advanced services affiliate is not yet operational in Texas. Indeed, the affiliate does not even have an interconnection agreement in Texas that complies with the FCC’s SBC/Ameritech merger conditions. As a result, the Commission cannot find that SWBT’s affiliate is “fully operational” in Texas at this time.

In particular, SWBT does not expect ASI to be “operational” in Texas on February 2, 2000, nearly a month after filing of this Application. However, according to the Brown Affidavit, ASI will not actually begin to place orders with SWBT in the same manner that CLECs do until February 28, 2000.¹⁴¹ As a result, there will be no means for the Commission to utilize performance measurements to confirm whether ASI is being

¹³⁹ *Bell Atlantic New York Order* at ¶ 330.

¹⁴⁰ *Id* at ¶ 332.

¹⁴¹ Brown Aff. ¶ 5.

treated the same as independent CLECs. Because of the way SWBT calculates its performance metrics, no significant data will not be available for SWBT's performance of unbundling and collocation services for ASI until *April 20, 2000*—conveniently *after* the Commission's decision is due on this Application.

More importantly, the Interconnection Agreement between SWBT and ASI—the T2A—does not contain any description of the methods and operations as to how SWBT will provide Interim Line Sharing to ASI.¹⁴² Indeed, to Covad's knowledge, none of ASI's interconnection agreements with any SBC incumbent LEC (Pacific Bell, Nevada Bell, SNET, Ameritech, and SWBT) contain any operational description of how the SBC ILEC provides Interim Line Sharing to ASI. Covad believes that it would greatly advance Covad's current negotiations with SWBT and other ILECs with regard to line sharing if SWBT had in fact disclosed in its Interconnection Agreement the manner in which it plans on providing line sharing to its ostensibly separate affiliate ASI.

In short, in the context of this Application and based upon the current record, the Commission has no basis to examine whether ASI is “fully operational” and is being treated like independent CLECs in a manner that would “ensure a level playing field.”¹⁴³

¹⁴² Goodpastor Decl at ¶¶ 36-38. As Goodpastor describes, ASI's original interconnection agreement with SWBT was withdrawn by ASI after Covad and other CLECs argued that the agreement did not meet the standards of the SBC/Ameritech Merger Order. ASI subsequently opted in to the Texas 271 Agreement. Even so, the T2A does not contain detailed description of SWBT provides ASI with Interim Line Sharing, an explicit requirement of the SBC/Ameritech Merger Order. *See* Letter from Lawrence E. Strickling, Federal Communications Commission, to Janette Luehring, Kansas Corporation Commission, DA 00-52 (rel. Jan. 12, 2000) (attached to the Goodpastor Decl. at Exhibit CG-12).

¹⁴³ *Bell Atlantic New York Order* at ¶¶ 330, 332.

2. *The “SBC/Ameritech Separate Affiliate” is Insufficient to Ensure Nondiscriminatory Treatment*

In the *Bell Atlantic New York Order*, the Commission did not specify any particular criteria for structural separation that the BOC must make in order to avail itself of the presumption of compliance with Checklist Item (iv). SWBT claims (Brown Aff. at ¶ 30) that the separate affiliate it is creating as a result of the SBC/Ameritech Merger Conditions is sufficient.

The SBC/Ameritech separate affiliate condition was never intended to be a panacea for all discrimination problems in SBC/Ameritech territory. To the contrary, the Commission explicitly found that absent creation of the affiliate and dozens of other conditions proposed by SBC and Ameritech, the merger of SBC and Ameritech would substantially harm the public interest. In eventually blessing the transaction, the Commission specifically concluded that “the structure of the separate advanced services affiliate that is required under the conditions *would not be adequate* for SBC/Ameritech’s provision of in-region, interLATA services following section 271 authorization.”¹⁴⁴

Several forms of structural separation have been suggested and debated before the Commission since passage of the 1996 Act.¹⁴⁵ In the *First Advanced Wireline Services Order and NPRM*, the Commission outlined a “truly separate” affiliate that would offer ILECs an “optional alternative pathway” to deregulation.¹⁴⁶ In its comments on that

¹⁴⁴ *SBC/Ameritech Merger Order* at ¶ 357.

¹⁴⁵ The 1998 First NPRM in the *Advanced Wireline Services* docket (CC Docket No. 98-147) specifically requested comment on structural separation for ILEC advanced services. In 1998, the Commission also sought comment on a structural separation proposal by LCI. *See* Commission seeks Comments on LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets, CC Docket No. 98-5, Public Notice, DA 98-130 (rel. Jan. 26, 1998). Comments submitted in those dockets discuss several forms of structural separation.

¹⁴⁶ *First Advanced Wireline Services Order and NPRM* at paras. 83, 86, 92.

proposal, Covad discussed that the only means of ensuring that the affiliate be “truly separate”, the Retail Entity should not be the sole shareholder of the Wholesale Entity (or vice versa)—otherwise, there would be no true “arms length” transaction.

In reality, SWBT’s separate affiliate still suffers from some fundamental flaws. In particular, it appears that ASI will only provide ADSL services in Texas—and not ISDN, T1 or frame relay services. This means that at best, a properly-functioning ASI will only remedy SWBT’s issues in providing loops for *ADSL* services. In the *Bell Atlantic New York Order*, the Commission expressed explicit concern that the separate affiliate “provide all varieties of advanced services” in order to ensure nondiscrimination.¹⁴⁷

As discussed above, ADSL is the “DSL of choice” for SWBT and most other ILECs, while CLECs have raced to provide other innovative forms of DSL, such as IDSL and SDSL. In particular, the TPUC Arbitration Panel ruled that “SWBT has shown a clear tendency to oppose provision of multiple xDSL technologies provided by CLECs on SWBT’s unbundled facilities.”¹⁴⁸

Since a close substitute for CLEC IDSL service is SWBT’s ISDN service, and since a close substitute for CLEC SDSL service is SWBT’s T1 and frame relay services, SWBT *will continue* to have the incentive to disadvantage CLEC deployment of IDSL

¹⁴⁷ “We view it as critical that a BOC provide all forms of advanced services through a separate affiliate, and not just ADSL, so the affiliate would need to obtain stand-alone loops from the BOC in order to provide all varieties of advanced services.” *Bell Atlantic New York Order* at n. 1037.

¹⁴⁸ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 13. In support, the Covad/Rhythms Arbitration Award quotes several disturbing internal SBC communications in March, 1998. In one communication, an SBC employee said: “We must unbundle what we offer not everything that anyone can think up.” Later, that same SBC employee wrote that “a well thought out approach [to DSL loop unbundling] could avoid another problem like we face with Covad and others in California.” Covad/Rhythms Arbitration Award (Exhibit CG-5) at 13-14. In the Arbitration, Covad put forward un rebutted proof that its DSL deployment in California had not caused any spectral interference issues.

and SDSL services—even if the separate affiliate is functioning according to the Commission’s plan.

In addition to the risk that a significant risk of discrimination remains even with the affiliate in place, other significant unanswered questions remain with SWBT’s separate affiliate. For instance, the *actual prices* as to how SWBT provides collocation for ASI are not disclosed. Relying on “individual case basis” quotes and virtual collocation will not adequately police the strong potential for discrimination.

3. *Requirements for a Fully Separate Affiliate*

Before permitting a BOC to avail itself of the “separate affiliate presumption” of compliance with Checklist Item (iv), the Commission should insist on the following requirements—

- The affiliate and the ILEC must have separate, publicly-traded shareholder equity. In the end, without separate equity ownership of the two companies, affiliate-ILEC transactions will always be internal transactions not handled at arms-length. If, however, two different sets of public shareholders are in place for the advanced services affiliate and the ILEC, the potential for shareholder derivative suits would act as a strong incentive against self-dealing that would benefit one entity over the other.¹⁴⁹
- The affiliate must also be the sole BOC retail sales outlet for ISDN, T1, frame relay and similar “hi cap” services.¹⁵⁰
- No joint marketing between the BOC and the affiliate should be permitted; otherwise, joint marketing efforts would be able to utilize line sharing arrangements in various anticompetitive tying arrangements.

¹⁴⁹ A certain amount of cross-ownership would be possible. For instance, if the ILEC arm of the BOC owned 10% of the voting equity of the advanced services affiliate and 90% of the voting equity of the affiliate were publicly traded, the BOC may be able to retain efficiencies of integration (if any) while true nondiscrimination benefits of structural separation would be retained.

¹⁵⁰ The ILEC arm would, of course, still be required to offer all unbundled network elements required by the *UNE Remand Order*, including DS3 links, unbundled dedicated transport, and dark fiber.

- The affiliate and the BOC should not be permitted to “share” personnel through joint personnel arrangements. As discussed above, SWBT has already been shown to provide discriminatory access to information by employees; having separate employees and firewalls would help ensure that the BOC-affiliate relationship be arms-length.
- The affiliate should have to obtain *physical* collocation arrangements (preferred by CLECs) and the prices for providing those arrangements should be in writing and disclosed (subject to a protective order).
- The advanced services affiliate should comply with *all* aspects of the Section 272 separate affiliate required for in-region interLATA services, without sunset.¹⁵¹
- The Commission must ensure that employees of the affiliate only access ILEC loop and other network information through the same interfaces, OSS systems, processes and procedures that are available to unaffiliated carriers.¹⁵²
- The Interconnection Agreement between the affiliate and the wholesale ILEC must be comprehensive and must—
 - Include a detailed written description of any line sharing arrangements between the affiliate and ILEC;
 - Include detailed written assurances of a “firewall” to prevent transfer of information from ILEC to the affiliate about independent CLEC operations;¹⁵³
 - Include a detailed written description of any transfer of information regarding the ILEC’s network deployment, upgrade or installation plans (such as SBC’s Project Pronto and efforts by ILECs to build a closed network architecture in remote terminals);

¹⁵¹ If the Commission permits the separate affiliate to “sunset”, the BOC should have to be required to re-apply for interLATA authority—and in that instance, the BOC would have to prove compliance with Checklist Item (iv) through the “performance” avenue of proof.

¹⁵² SWBT does not currently meet this standard. Brown states that ASI marketing employees will not have to go through these CLEC interfaces, OSS, processes and procedures until April 5, 2000. Brown at ¶ 22. As a result, ASI currently has a significant competitive advantage in providing advanced services in Texas.

¹⁵³ As discussed above, the Covad/Rhythms Arbitration uncovered instances in which SWBT had shared confidential CLEC collocation plans with SWBT’s retail ADSL deployment group. In addition, the arbitration found evidence that SWBT granted its ADSL retail personnel to loop makeup and network information to which CLECs had no access.

- Include the nature of any joint purchasing and all instances in which the affiliate provides services to the ILEC. For instance, services agreements in which the affiliate sells ADSL services or equipment to the ILEC would need to be disclosed and made part of the Interconnection Agreement.
- Be in writing and made available to all independent CLECs.

* * *

Since SBC's separate advanced services affiliate was not fully operational at the time the Application was filed—and seemingly will not be “fully operational” until at least April 5, 2000, when SBC claims that ASI will begin to utilize the interfaces, OSS and procedures independent CLECs use in Texas—SBC cannot rely upon this avenue of proving compliance with the checklist with regard to xDSL-capable loops. That said, to promote certainty in future application, the Commission might find it beneficial to take the opportunity of this proceeding to spell out in detail precisely what type of “separate affiliate” would be necessary for a BOC to establish in order to avail itself of this avenue of satisfying this portion of the checklist.

D. SWBT Can Show No “Special” or “Unique” Circumstances regarding xDSL-Capable Loops that Warrant Social Promotion

In the *Bell Atlantic New York Order*, the Commission clearly stated that since it has “provided direction to the BOCs regarding their obligation to provide xDSL-capable loops in accordance with the requirements of the competitive checklist” (336), it did not expect to grant any more 271 applications based on the “special” or “unique circumstances” that it found to exist in Bell Atlantic's New York application.¹⁵⁴ Yet, in its Application, SWBT implies that perhaps it too deserves a “free pass” on DSL loop

¹⁵⁴ *Bell Atlantic New York Order* at ¶¶330, 336.

issues in this proceeding because DSL loops issues only recently arisen in Texas.¹⁵⁵

SWBT's argument does not hold water—because the reason data CLECs are only now beginning to scale their operations in Texas is solely because of SWBT's conduct.

Access to DSL loops is far from a “new” issue in Texas. Covad—a CLEC that *only* provides xDSL services over unbundled DSL-capable loops—first requested an interconnection agreement with SWBT in Texas on May 29, 1998. After two months of negotiations—which went absolutely nowhere, based in part upon SWBT's unilateral position that CLECs could only provide ADSL and not other xDSL services over unbundled loops—Covad began to participate in the Texas Commission 271 process.

Covad sought to participate in the Texas 271 process for several reasons: negotiations with SWBT had stalled, the 271 process in the state would be a critical forum to address the methods and procedures for ordering and obtaining DSL-capable loops in Texas, and Covad believed that its seven months of real-world operational experience as a data CLEC in California with SBC's California affiliate, Pacific Bell, would be helpful for the Texas Commission's 271 review.

Rather than welcome Covad's participation and focus on DSL issues, SWBT went ballistic. On July 27, 1998, SWBT opposed Covad's participation in the Texas 271 process, arguing—

■ “Covad has no basis to participate in this project.”¹⁵⁶

¹⁵⁵ SWBT Brief at 39 (“Although SWBT filed its draft section 271 application with the Texas Commission in March 1998, CLECs did not request Digital Subscriber Line (“xDSL”)-capable loops in any significant quantity until September 1999).

¹⁵⁶ Southwestern Bell Telephone Company's Opposition to Covad Communications Company's Motion for Leave to Participate, Project No. 16251, Investigation of Southwestern Bell Telephone Company's Entry into the Texas interLATA Telecommunications Market (July 27, 1998) at 1.

- “There is absolutely nothing that Covad’s participation could add to the collaborative process.”¹⁵⁷

The Texas Commission ultimately permitted Covad to participate. However, the implication of the episode was clear—SWBT did not roll out the “welcome mat” for DSL competitors in Texas, and the SWBT did not want the Texas 271 process to include DSL issues. SWBT has been trying to sweep CLEC DSL issues under the rug ever since.

Ever since that first episode, SWBT has abused the regulatory process to delay Covad’s entry and delay resolution of Covad’s operational issues. The Texas Commission has done an admirable job to take active steps to counter SWBT’s recalcitrance, such as ordering SWBT to provide Covad and Rhythms an Interim Arbitration agreement while it continued to consider the Covad/Rhythms arbitration.

In fact, the litany of instances of SWBT recalcitrance to DSL entry is amazing in its length—

- SWBT took unreasonable and unlawful positions in the Covad negotiations, such as proposing that Covad endure a “bona fide request” process to provide any service other than ADSL over unbundled local loops.¹⁵⁸
- SWBT also initially insisted on reserving the right to place “Spectral Detector Coils” on Covad’s loops to monitor the services Covad was providing to its customers.¹⁵⁹
- SWBT refused to disclose its digital loop cost studies and its Technical References directly to Covad, even though SWBT proposed that costs and Referenced be incorporated into the Interconnection Agreement.¹⁶⁰

¹⁵⁷ *Id.*

¹⁵⁸ Goodpastor Decl. ¶¶ 6-7.

¹⁵⁹ *Id.* at ¶ 10.

¹⁶⁰ *Id.* at ¶ 11 and Exhibit CG-1.

- After Covad and Rhythms filed petitions for arbitration in Texas, in January 1999, an SBC attorney ordered 81 SWBT, SBC and Pacific Bell to destroy evidence relevant to the arbitration.¹⁶¹
- During initial discovery during the Covad/Rhythms arbitration, SWBT produced a total of 63 pages in response to Covad and Rhythms requests. After Covad and Rhythms determined at an April 1999 hearing that SWBT had not produced a document called “Southwestern Bell DSL Methods and Procedures” and other document, the arbitrators ordered additional discovery. SWBT eventually produced 13 boxes of material responsive to Covad and Rhythms requests.¹⁶²
- After learning of SWBT’s discovery abuses at the April 14, 1999 hearing, the Arbitration Panel ordered SWBT to enter into an Interim Interconnection Agreement with Covad and Rhythms. SWBT appealed that decision, delaying Covad and Rhythms entry even further. Covad’s Interim Interconnection Agreement was not executed until June 2, 1999.¹⁶³ This was more than one year after Covad’s initial request for an interconnection agreement.
- SWBT’s conduct in the Arbitration and its appeal of the Order to enter into an Interim Arbitration Agreement kept Covad and Rhythms out of the market through the Summer of 1999. As a result, both Covad and Rhythms were unable to participate in the Telcordia testing, which concluded on July 15, 1999.¹⁶⁴
- On July 27, 1999, the Texas Arbitrators ruled that SWBT had engaged in sanctionable conduct during the Covad/Rhythms arbitration, including the instruction to destroy documents, failure to produce responsive documents, and intentional designation of witnesses without requisite knowledge of the subject matter. The Texas Commission affirmed this decision, and SWBT was eventually forced to pay Covad and Rhythms \$850,000.¹⁶⁵
- SWBT’s conduct in the negotiations and arbitration alone delayed Covad and Rhythms entry into the market by several months. Through no fault

¹⁶¹ *Id.* at ¶¶ 4, 17 and Exhibit CG-2.

¹⁶² *Id.* at ¶ 16.

¹⁶³ *Id.* at ¶ 18.

¹⁶⁴ *Id.* at ¶¶ 23-24.

¹⁶⁵ *Id.* at ¶ 19 and Exhibit CG-4 (Sanctions Order).

of their own, the Texas Arbitrators were not able to issue an Award until November 30, 1999—nearly a year after Covad and Rhythms filed petitions for arbitration.¹⁶⁶

- On January 6, 2000, SWBT appealed the Covad/Rhythms Arbitration Award. The Arbitrators found the appeal meritless. Nevertheless, as of the day SWBT filed its 271 Application, its appeal of the Award was pending before the Texas Commission.¹⁶⁷

It is important to note that SWBT's repeated intransigence, abuses, and appeals delayed Covad's entry into the market by nearly a year. Pursuant to Section 252(a), Covad was entitled to have the Texas Commission resolve "all outstanding issues" with regard to a Covad-SWBT interconnection agreement within nine months of Covad's initial request on May 29, 1998. Instead, at the time SWBT filed its 271 application, all outstanding issues were *still* not resolved between Covad and SWBT, most lately due to its insistence on appealing the Texas Commission Arbitration Award. As of this writing, more than *twenty* months have passed since Covad's initial request for interconnection—nearly a year longer than the period contemplated by Congress.

In summary, SWBT's claim that it is now a reformed monopolist rings hollow. Frankly, SWBT has not even admitted that it has a problem—let alone willingly submit to a higher authority. A court of equity would swiftly reject SWBT's arguments simply by invoking the doctrine of "unclean hands."¹⁶⁸

¹⁶⁶ *Id.* at ¶ 20.

¹⁶⁷ *Id.* at ¶ 21 and Exhibits CG-6 and CG-7.

¹⁶⁸ *See* McClintock, *Equity* § 26 (describing the principle in which a party seeking redress must not have done any unethical or dishonest act in the transaction for which the party seeks redress).

III. CONCLUSION: SAYING YES TO SAYING NO

In spite of SWBT's to sweep DSL-related issues under the carpet and out of the 271 process, the Texas Commission has taken valiant, affirmative steps to open up Texas to vigorous DSL entry by Covad and other CLECs. At every step, the Texas Commission has uncovered SWBT's dilatory and discriminatory tactics and ordered the necessary changes to SWBT's OSS, prices, and provisioning methods.

But we are still in the middle of that process. Full implementation of the Covad/Rhythms Arbitration Award is a significant part of ensuring nondiscriminatory access to OSS, unbundled loop pricing, and xDSL-capable loops provisioning in Texas. The Texas Commission has set forth a rapid implementation timeline that would establish a proper, real-time loop qualification system, final rates for xDSL-capable loops and conditioning, but that process has just begun.

As discussed in Section II.B above, SWBT's performance measurements relevant for advanced services contain gaping holes that exclude the vast majority of Covad (and presumably other CLEC) loop orders from examination. What evidence that does exist shows that SWBT simply is incapable of handling the volumes of xDSL-capable loops it is receiving. In addition, SWBT's separate advanced services affiliate does not provide SWBT a "way out", because the affiliate it is not yet operational in Texas and the affiliate does not adequately protect data CLECs from discrimination. In the end, with regard to xDSL-capable loops, SWBT's application is not supportable by the facts and instead must depend upon a series of paper promises.

A better solution would be for the Commission—

- to insist that SWBT prove that it has actually dismantled its discriminatory binder group segregation and spectrum management systems, as already ordered by the Texas Commission and the FCC;
- to insist that SWBT implement nondiscriminatory, real-time access to loop makeup information, as already ordered by the Texas Commission and the FCC;
- to insist that SWBT fix its performance measurement system so that it would track *all* xDSL-capable loop orders, not less than one-half;
- to insist on a *complete* independent third-party test of SWBT's DSL systems and processes—not a test that consisted of watching pictures download over an ADSL line and that examined processes for a grand total of four xDSL-capable loops; and
- to insist on *true* structural separation to ensure that CLECs receive nondiscriminatory treatment; and
- to recognize that SWBT had intentionally delayed data CLEC entry in Texas and that SBC does not therefore deserve a “get out of jail free” card.

In short, a better solution would be to insist on full compliance with the 1996 Act and the checklist.

Respectfully submitted,



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Dated: January 31, 2000

Declaration of Christopher V. Goodpastor
Exhibit List

1. Letter from Amy Wagner, Representative of SWBT in Interconnection Agreement negotiations with Covad (Nov. 16, 1998);
2. ACI Exhibit 153, DSL Arbitration: E-mail directive to destroy evidence from an SBC attorney to 81 employees of SBC and its affiliates (Jan. 11, 1999);
3. Interim Interconnection Agreement between Covad and SWBT (June 2, 1999);
4. Order No. 20, DSL Arbitration: Arbitrators' Ruling on Motions for Sanctions of Covad and Rhythms (July 27, 1999);
5. Arbitration Award, DSL Arbitration (Nov. 30, 1999);
6. SWBT's Request for Reconsideration of Arbitration Award, DSL Arbitration (Jan. 6, 2000);
7. Recommended Decision of Arbitrators regarding SWBT's Request for Reconsideration, DSL Arbitration (Jan. 20, 2000);
8. Excerpts of the Memorandum of Understanding filed by SWBT with the Public Utility Commission of Texas (Apr. 26, 1999);
9. T2A, Attach. 25: xDSL;
10. Supplemental Direct Testimony of Anjali Joshi, DSL Arbitration: Discusses anti-competitive effects of SWBT's Selective Feeder Separation scheme (May 24, 1999);
11. NARUC Presentation of Advanced Services, Inc.: Shows ASI's line-sharing architecture with SWBT;
12. Letter from Larry Strickling to Kansas Corporation Commission (Jan. 12, 2000): Requires SWBT and ASI to articulate the terms of their line-sharing arrangement;
13. Motion of Northpoint, Rhythms and Covad to Require SWBT and ASI to Supplement the Terms of Their Interconnection Agreement, filed with the Public Utility Commission of Texas (Jan. 18, 2000);
14. Opposition to Motion to Supplement of SWBT and ASI, filed with the Public Utility Commission of Texas (Jan. 25, 2000).

Declaration of Michael Smith
Exhibit List

1. SWBT's Job Aid for DSL Capable Loops;
2. Excerpts from SWBT Local Service Ordering Requirements;
3. Email from Covad requesting passcodes to SWBT's mechanized ordering systems and SWBT's response to Covad's request;
4. Blank SWBT Local Service Request ("LSR") form;
5. SWBT's Interim DSL Loop Order Provisions;
6. SWBT's DSL Technologies Table;
7. Completed SWBT LSR Form;
8. SWBT LSR Reject Notice (Confidential & Proprietary);
9. Letter from Christopher Goodpastor to SWBT requesting SWBT to process Covad's loop orders without rejection (Oct. 11, 1999);
10. Reconciled data regarding SWBT's response to DSL loop orders placed by Covad in September and October (Confidential & Proprietary);
11. Additional data regarding SWBT's response to DSL loop orders placed by Covad in September and October (Confidential & Proprietary).

Declaration of Matthew Wall
Exhibit List

1. Covad loop orders from SWBT in Texas, calendar year 1999 – Confidential;
2. Covad loops in service in SWBT territory in Texas, calendar year 1999 - Confidential;
3. SWBT performance measurement tracking reports provided to Covad on Jan. 25, 2000 – Confidential.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
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Application by SBC Communications Inc.,)	
Southwestern Bell Telephone Company, And)	CC Docket No. 00-04
Southwestern Bell Communications Services,)	
Inc., d/b/a Southwestern Bell Long Distance)	
For Provision of In-Region InterLATA)	
Services in Texas)	
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**DECLARATION OF CHRISTOPHER V. GOODPASTOR
ON BEHALF OF COVAD COMMUNICATIONS COMPANY**